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its particular facts.⁹ If this proposition is granted, it would also seem that such an agreement should be irrevocable if made so in terms, and supported by a good consideration or coupled with an interest.¹⁰

FRAUD AND INCONTESTABILITY CLAUSES IN LIFE INSURANCE POLICIES.—Most life insurance policies now contain a clause providing that in certain contingencies the policy shall be incontestable. How does this affect the underwriter's right to contest liability because of deceit in the application for the insurance? This question presents two others: does the language of the clause mean that the defense of fraud is waived; and if so, is the stipulation valid to that extent? On the first of these the authorities are agreed that the words "shall be incontestable," without more, mean a waiver of the defense of fraud.¹ Moreover, on the principle of construing the contract most strongly against the underwriter,² courts have usually allowed the incontestability clause to prevail,³ even where other parts of the contract indicate that misrepresentation shall be ground for refusal of payment.

This stipulation appears in two forms, the one stating that the policy is incontestable from date, and the other providing that it shall be so after the lapse of a given time. The validity of an agreement in a contract not to set up the defense of fraud in an action on that contract has often been at issue in cases foreign to the subject of insurance; and while there is a clear conflict of authority, the better view holds most agreements of this nature void.⁴ Fraud does not "vitiate consent,"⁵ so as to make any negotiation into which it enters a nullity, but only gives the innocent party the option of avoiding the contract.⁶ While this can be waived, after the fraud is discovered,⁷ it is against public policy to permit a fraudulent person to reap benefit from his deceit merely by introducing an agreement about it into the original contract.⁸ But it is submitted that in life insurance contracts the attitude of the law should be different.⁹ In these the mooted provision is not inserted by the party seeking to benefit by it, but by the insurance company¹⁰

⁹ *Mobile & Ohio R. R. Co. v. Nicholas*, 98 Ala. 92; *Williams v. Montgomery*, 148 N. Y. 519; *Smith v. S. F. & N. P. Ry. Co.*, 115 Cal. 584; *Greene v. Nash*, 85 Me. 148. See *Brightman v. Bates*, 175 Mass. 105; 15 HARV. L. REV. 756.

¹⁰ See *Chapman v. Bates*, *supra*; *Smith v. S. F. & N. P. Ry. Co.*, *supra*; 10 HARV. L. REV. 428. *Contra*, *Griffith v. Jewett*, 15 Wkly. L. Bul. 419 (Oh.).

¹ *Mass. Benefit Life Assn. v. Robinson*, 104 Ga. 256; *Wright v. Mutual Benefit Life Assn.*, 118 N. Y. 237. But see *Reagan v. Union Mutual Life Ins. Co.*, 189 Mass. 555.

² See *National Bank v. Ins. Co.*, 95 U. S. 673, 678.

³ *Ins. Co. v. Fox*, 106 Tenn. 347; *Vetter v. Mass. National Life Assn.*, 29 N. Y. App. Div. 72. *Contra*, *Welch v. Union Central Life Ins. Co.*, 108 Iowa 224.

⁴ See 18 HARV. L. REV. 466.

⁵ This language, however, is common. See VANCE, INSURANCE, 532.

⁶ See *Nealon v. Henry*, 131 Mass. 153; WILLISTON'S WALD'S POLLOCK CONTRACTS, 706.

⁷ See *Wheeler v. McNeil*, 101 Fed. 685.

⁸ *Hoffin v. Moss*, 67 Fed. 440; *Bridger v. Goldsmith*, 143 N. Y. 424.

⁹ See RICHARDS, INSURANCE, §§ 379, 380.

¹⁰ Statutes in several states forbid companies to issue a policy without a clause of incontestability. See ALA. CIV. CODE, 1907, § 4573; MASS. ACTS & RESOLVES, 1907,

to make its policies more attractive. As the underwriter is under no obligation to accept an application for insurance on receiving it, it is possible, even if not altogether feasible, for him to inquire about the representations therein before issuing the policy.¹¹ If the clause of incontestability is enforced the practical result will be that the underwriter will be more vigilant while the matter is fresh¹² and that fewer policies will be issued to unsuitable persons. It is most undesirable, moreover, that it should lie in the power of the company to resist every claim with an allegation of fraud, advanced for the first time after the death of the person accused.¹³

When the clause makes the policy incontestable not from date, but after a given period, as is more common, its practical and intended effect is merely to create a short statute of limitations in favor of the insured.¹⁴ This is not open to the objection of condoning fraud.¹⁵ It would seem that it should be valid in those jurisdictions which respect agreements to shorten the statutory limitation, but invalid in those which do not. States holding the former view have always given the clause effect.¹⁶ But one court, though bound by the latter view,¹⁷ has recently held that a clause providing for incontestability after one year bars the defense of fraud after that time. *Citizens' Life Ins. Co. v. McClure*, 127 S. W. 749 (Ky.).¹⁸ Its decisions seem irreconcilable,¹⁹ and the latest case is a strong one for the validity of the incontestability clause.²⁰

WHAT IS CRUEL AND UNUSUAL PUNISHMENT. — The inhibition of the infliction of "cruel and unusual punishment" first appears in the

c. 576, § 75, p. 896. In none, however, must the clause provide for immediate incontestability. For example, see N. Y. LAWS, 1906, c. 326, § 101 (amended by LAWS, 1907, c. 714).

¹¹ See *Ins. Co. v. Fox*, *supra*.

¹² See *Wright v. Mutual Benefit Life Assn.*, 43 Hun (N. Y.) 61.

¹³ This argument was advanced in *Mass. Benefit Life Assn. v. Robinson*, *supra*; *Clement v. Ins. Co.*, 101 Tenn. 22, in which cases, however, the clause did not provide for immediate incontestability. Of the cases on immediate incontestability, *Ins. Co. v. Fox* takes the view expressed here. *Contra*, *Reagan v. Union Mutual Life Ins. Co.*, *supra*; *Welch v. Union Central Life Ins. Co.*, *supra*. See 19 HARV. L. REV. 470.

¹⁴ See *Drews v. Metropolitan Life Ins. Co.*, 75 Atl. 167 (N. J.); *Murray v. State Mutual Life Ins. Co.*, 22 R. I. 524. Several courts have said that they would make a distinction between the two kinds of clauses. See *Reagan v. Union Mutual Life Ins. Co.*, *supra*; *Mass. Benefit Life Assn. v. Robinson*, *supra*.

¹⁵ Thus equity will cancel the policy for fraud, at the suit of the insurance company brought within the period. *John Hancock Mutual Life Ins. Co. v. Houpt*, 113 Fed. 572.

¹⁶ Most jurisdictions hold this view. See *Mutual Life Ins. Co. v. New*, 51 So. 61 (La.); *Flanigan v. The Federal Life Ins. Co.*, 231 Ill. 399; *Brady v. Prudential Ins. Co.*, 168 Pa. St. 645.

¹⁷ *Union Central Life Ins. Co. v. Spinks*, 119 Ky. 261. See also *Omaha Fire Ins. Co. v. Drennan*, 56 Neb. 623.

¹⁸ This is apparently the first case in which this precise situation has presented itself.

¹⁹ See *New York Life Ins. Co. v. Weaver's Administrator*, 114 Ky. 295, in which the same court decided that after the period specified in the incontestability clause, an insurance company which had paid the face of the policy could not maintain an action for deceit.

²⁰ No case has been found holding that an incontestability clause taking effect after a specified time, does not bar the defense of fraud after that time.